



DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1399

December 12, 2013

Office of Counsel

Samuel Unger, P.E.
Executive Officer
Los Angeles Regional Water Quality Control Board
320 West 4th Street, Suite 200
Los Angeles, California 90013

SUBJECT: U.S. Army Corps of Engineers' Response to Sixty-Day Notice of Intent to Sue

Dear Mr. Unger:

This letter is the United States Army Corps of Engineers ("Corps") response to the Sixty-Day Notice of Intent to Sue for Violations of the Federal Water Pollution Control Act, dated October 31, 2013, (NOI) sent by the Los Angeles Regional Water Quality Control Board ("RWQCB") to the Secretary of the Army, the Commanding General of the Corps, and the Commander of the Corps' South Pacific Division. The Corps' South Pacific Division ("SPD") located in San Francisco, California is one of nine Corps' Division offices, directly responsible to the Corps' Chief of Engineers. I am the principal legal advisor for SPD. Within the authorities delegated, SPD directs and supervises four Corps' Districts located in Albuquerque, New Mexico and in Sacramento, Los Angeles, and San Francisco, California. One of the primary national missions of the Corps is flood risk management ("FRM"). Ensuring proper conveyance capacity within FRM channels is critical for the protection of people and property. The NOI refers to certain FRM activities conducted by the Corps' Los Angeles District.

The NOI alleged that the Corps was required to obtain water quality certification pursuant to section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, from the RWQCB prior to removing accumulated sediment and vegetation from Verdugo Wash and Sepulveda Basin of the Los Angeles River. The Corps has carefully reviewed the circumstances in question. The facts demonstrate that the Corps did not perform work in Verdugo Wash or the Sepulveda Basin of the Los Angeles River for which a CWA section 401 certification (that was not obtained) was required from the RWQCB. Accordingly, we respectfully request your reconsideration and also request that the NOI be rescinded.

The CWA makes the discharge of any pollutant into navigable waters by any person unlawful, absent compliance with specific provisions of the Act. *See* 33 U.S.C. §§ 1311(a), 1362(7), 1362(12). One such provision is the CWA section 404, 33 U.S.C. § 1344, a permitting system for the discharge of dredged or fill material which is administered by the Corps.

Generally, in order to avoid liability under the CWA, a person or entity who wishes to discharge dredged or fill material must first obtain a CWA section 404 permit. Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged and fill material by applying all applicable substantive legal requirements pursuant to the authority at 33 C.F.R. § 336.1.

Subsection 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1), provides that “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.” The State of California has authority to give such a certification, which it has delegated to the RWQCB.

CWA Sections 404 and 401 are interdependent. If dredging or filling activities do not require a permit under CWA section 404, they also do not require a CWA section 401 certification. CWA subsection 404(f)(1), 33 U.S.C. § 1344(f)(1), exempts activities specifically identified in CWA subsections 404(f)(1)(A)-(F) from CWA section 404 permitting requirements. *See also* 33 C.F.R. §§ 323.2(d)(3)(iii) and 323.4. In order to be exempt from the CWA section 404 permit requirements, however, the activity must be exempt under one of the provisions in subsection 404(f)(1) and must not be subject to “recapture” under CWA subsection 404(f)(2). The NOI lacked acknowledgment concerning the applicability of these exemptions to the Corps’ activities in question.

In addition to the exemptions contained in CWA subsection 404(f)(1), Corps’ regulations except certain activities from the need to obtain a CWA 404 permit. One such exception is for “[a]ny incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States.” 33 C.F.R. § 323.2(d)(3)(i). The NOI lacked the recognition of the applicability of the exceptions to CWA section 404 permitting requirements that are contained in the Corps’ regulations.

As explained below, the activities that the Corps performed to remove accumulated sediment and vegetation from Verdugo Wash and Sepulveda Basin of the Los Angeles River were either exempt or excepted from the requirement of a CWA section 404 permit and, consequently, required no CWA section 401 certification. They were necessary and critical activities for purposes of achieving the flood risk management requirements of the authorized projects.

A. Verdugo Wash

Verdugo Wash (VW) is a feature of the Los Angeles County Drainage Area (LACDA) project, a congressionally authorized flood risk management project, which the Corps constructed pursuant to the Emergency Relief Appropriation Act of April 8, 1935, as amended,

and the Flood Control Act of 1936, as amended. Pursuant to the Flood Control Act of 1938, the Corps is authorized to perform operation and maintenance of VW from San Fernando Road to the Los Angeles River. The Verdugo Wash Debris Basin and the Verdugo Wash Debris Basin Dam, a concrete structure, are located below San Fernando Road. The channel from the dam to the confluence of VW and the Los Angeles River is an engineered, fully concrete, currently serviceable structure.

Beginning in October 2011, and continuing until February 28, 2012, a Corps contractor removed vegetation, sediment, and debris from VW. Sediment and vegetation was removed from within this concrete-lined structure only for the purpose of restoring its conveyance capacity. No dewatering or stream diversion was performed. Sediment and debris removed from the drainage were disposed of at an offsite, upland disposal area.

Sediment and debris removal from an engineered, fully concrete, currently serviceable structure in order to allow the structure to function as designed is a maintenance activity exempt from regulation under subsection 404(f)(1)(B) of the CWA. Corps' regulations provide that "[m]aintenance does not include any modification that changes the character, scope, or size of the original fill design." 33 C.F.R. § 323.4(a)(2). The Corps' maintenance activities for the VW did not change the original fill design of the concrete-lined channel, and, therefore, the Corps was performing exempted maintenance. Subsection 404(f)(2) of the CWA requires any person to obtain a section 404 permit, even if otherwise exempt under subsection 404(f)(1), if the person engages in "any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2). This "recapture" provision would not apply to any discharge of dredged or fill material associated with the sediment and vegetation removal activities which occurred at VW because the Corps' sole objective was to restore conveyance capacity of this channel, not to bring an area of the navigable waters into a new use. In addition, the Corps' maintenance activities at the VW enhanced rather than impaired the flow and circulation of the navigable waters, and did not reduce the reach of such waters. The CWA subsection 404(f)(2) recapture provision did not apply. Thus, there was not a requirement for a CWA section 404 permit for this activity. Accordingly, there was not a requirement to obtain a CWA section 401 water quality certification for the Corps' maintenance activities at VW.

The NOI refers to the Corps' "Categorical Exclusion (CX) and Record of Environmental Consideration (REC) Verdugo Wash Operation and Maintenance Ramp Repair." The ramp repair did not require a CWA section 404 permit or a CWA section 401 certification, because it involved no work in a water of the United States. Repair of the ramp was necessary to have access to the channel for maintenance activities. In 2010, the Corps contracted for the repair of the VW access ramp. The contract required hardening of the ramp slopes and removal of vegetation. The Corps determined that the ramp work would not discharge dredged or fill material into waters of the U.S., because the work took place above the ordinary high water mark and outside of the waters of the U.S. See 33 C.F.R. § 328.4(c)(1).

The NOI at page 3, second paragraph refers to a site inspection. The RWQCB does not identify the time, date or locations of the "site inspection." Additionally, the NOI did not attach an inspection report.

The NOI suggests that the Corps has not been forthcoming regarding its activities. Corps' records demonstrate that the Corps has repeatedly provided the RWQCB information it has requested. In fact, significant effort has been devoted to preparing thorough responses to the RWQCB's investigatory orders and letters, including questions which did not appear consistent with the RWQCB's CWA jurisdiction.

B. Sepulveda Basin

The NOI confounds vegetation management activities in the uplands of the Sepulveda Basin with routine sediment and vegetation removal activities within the Los Angeles River and Haskell Creek that are necessary to restore the conveyance capacity of those channels. In early 2012, the Corps developed a Sepulveda Basin Vegetation Management Plan (SBVM Plan) for a 48-acre area located south of Burbank Boulevard and east of the Los Angeles River. The purpose of the SBVM Plan is to eradicate, through mowing and mulching in place, non-native vegetation and vegetative debris and to replace them with native plants. Under the SBVM Plan, suitable, sustainable habitats such as oak woodland, grasslands, coastal sage scrub, and riverine marsh are to be actively and passively restored once the non-native vegetation is eliminated. Activities to implement the SBVM Plan were undertaken within the 48-acre area in December 2012, separate from the operations and maintenance activities in the Los Angeles River. Vegetation matting activities are part of the implementation of the initial phase of the SBVM Plan, which involved some use of heavy equipment, and occurred only in upland areas.

Any dredging or filling activities that the Corps conducted in the Sepulveda Basin during the time period raised in the NOI were routine operations and maintenance activities exempt or excluded from section 404 permitting requirements under the CWA. The Los Angeles River from Burbank Boulevard to the Sepulveda Dam outlet works and the lower portion of Haskell Creek are engineered, fully concrete, currently serviceable structures. Sediment and vegetation was only removed from within these concrete-lined channel structures to restore their conveyance capacity. No dewatering or stream diversion was performed. Sediment and debris removed from the concrete channel structures were disposed of in uplands, such as an offsite, upland disposal area. No heavy equipment entered any section of the river or its tributaries that was not concrete-lined. Sediment and debris removal from engineered, fully concrete, currently serviceable structures in order to allow the structures to function as designed is a maintenance activity exempt from CWA section 404 permitting requirements under subsection 404(f)(1)(B) of the CWA. The Corps' maintenance activities did not change the original fill design of the concrete-lined channels, and, therefore, clearly qualified as exempt maintenance under the Corps regulations, cited above. The recapture provision of CWA subsection 404(f)(2), 33 U.S.C. § 1344(f)(2), does not apply to any discharge of dredged or fill material associated with the sediment and vegetation removal activities, because the Corps' sole objective was to restore conveyance capacity of this channel, not to bring an area of the navigable waters into a new use.

Also, the Corps' maintenance activities of the concrete channel structures within the Sepulveda Basin enhanced, rather than impaired the flow and circulation of the navigable waters. Furthermore, there was no reduction in the reach of such waters. Since the CWA subsection 404(f)(2) recapture provision did not apply, and because there was no CWA section 404 permit required to conduct the activity, there was not a requirement to obtain a CWA section 401 water quality certification. In other words, the Corps did not perform work in the concrete-lined sections of the Los Angeles River or Haskell Creek for which a CWA section 401 certification was required from the RWQCB. Due to these circumstances, the Corps did not seek or obtain a CWA section 401 certification.

Further, even assuming the CWA subsection 404(f)(1) exemption did not apply, any incidental addition of dredged material associated with the Corps' operation and maintenance activities within the soft-bottom portion of Haskell Creek would be excepted from the need for a CWA section 404 permit pursuant to 33 C.F.R. § 323.2(d)(3)(i). No heavy equipment entered the soft bottom section of Haskell Creek. An excavator was used to reach into Haskell Creek to remove vegetation by scraping the vegetation from the creek up to the bank. No dewatering or stream diversion was performed. Material was transported by dump trucks to an offsite, upland disposal location. Both the loader and the excavator crossed from the west side of the Los Angeles River across the Los Angeles River and accessed the work area through a low point in the concrete-lined channel of the Los Angeles River just south of the confluence of Haskell Creek. This activity did not alter the drainage ditch in such a way that it would no longer be a water of the United States and had no more than a *de minimis* effect on the area or any aquatic function. This maintenance work did not have the effect of destroying or degrading an area of waters of the United States and is therefore excepted from the need for a permit. Pursuant to 33 C.F.R. § 323.2(d)(3)(i), a CWA section 404 permit was not required for any incidental addition of dredged material in connection with the maintenance activities performed within the soft bottom portion of Haskell Creek. Thus, a CWA section 401 water quality certification from the RWQCB was not required prior to performing those activities.

CWA subsection 404(f)(1)(C) provides an additional reason why no CWA section 404 permit, and no CWA section 401 certification, was required for the maintenance activities performed within the full reach of Haskell Creek. Haskell Creek, excavated from uplands in the 1970s, is a drainage ditch, from its origin to its confluence with the Los Angeles River, that conveys storm water and treated effluent to the Los Angeles River. The work in question involved removing sediment and vegetation to restore conveyance capacity. Material was transported by dump trucks to an offsite, upland disposal location. No dewatering or stream diversion was performed. No fish were observed in the maintenance area. Removal of accumulated sediment and vegetation to restore the conveyance capacity of a drainage ditch is a maintenance activity exempt from regulation under CWA subsection 404(f)(1)(C), 33 U.S.C. § 1344(f)(1)(C). The recapture provision of CWA subsection 404(f)(2) does not apply to this activity for the same reasons that it does not apply to the work in the Los Angeles River. Therefore, the Corps was not required to obtain CWA section 401 water quality certification from the RWQCB prior to performing maintenance activities within all of Haskell Creek.

The track marks mentioned in the NOI are evidence of exempt, routine operations and maintenance activities in concrete-lined channels. Encino Creek is an armored and concrete channel upstream for approximately 250 feet from the confluence with the Los Angeles River. The loader crossed Encino Creek within the 250-foot concrete section and continued along the banks of the Los Angeles River until it reached a low point, which it used to access the Los Angeles River and carry out the removal activities. Neither sediment nor vegetation was removed from Encino Creek, and no dredged or fill material was deposited in Encino Creek. Therefore, the Corps was not required to obtain CWA section 401 water quality certification from the RWQCB prior to equipment crossing Encino Creek.

Finally, the NOI erroneously suggests that Corps activities in the vicinity of Pothole Pond, which the RWQCB characterizes as "a water of the State of California," required a CWA section 401 certification. Pothole Pond is a depression, approximately 4-feet deep, which was excavated from uplands in 1979 in the northeast corner of the 48-acre SBVM Plan work area. Corps records indicate that the Corps agreed to a Public Recreational Use Plan with the California Department of Fish and Wildlife and the City of Los Angeles in 1987, now expired, which approved use of reclaimed water from Tillman Plant to supply Pothole Pond. A pipeline was constructed, operated and maintained by the City to provide Pothole Pond with reclaimed water. There are no natural sources of water for Pothole Pond. The City of Los Angeles stopped supplying water to Pothole Pond in May of 2012. Since that time, Pothole Pond has been dry for long periods of time. Water in the pond is lost through evaporation or absorption into the ground. There are no drainages that connect the pond to either Haskell Creek or the Los Angeles River. Pothole Pond is not a water of the United States.

In preparing a response to the RWQCB January 10, 2013 investigatory order, the Corps conducted a site inspection and jurisdictional determination of the terraces adjacent to Haskell Creek and Pothole Pond on January 29, 2013. The Corps utilized the 1987 Wetland Delineation Manual to evaluate whether wetlands were present within the terraces adjacent to Haskell Creek and/or Pothole Pond and determined that they were not. The approved jurisdictional determination confirmed that Pothole Pond and the terraces adjacent to Haskell Creek are not considered waters of the United States.

C. Conclusion

There is no factual basis for the NOI's assertion that the Corps performed work in Verdugo Wash or the Sepulveda Basin of the Los Angeles River for which a CWA section 401 certification was required. Any discharges of dredged or fill material associated with the activities to which the notice refers fall within exemptions or exceptions from permitting requirements under section 404 of the CWA.

The Corps' anticipates that with the information provided in this letter and perhaps further discussions, the RWQCB will reconsider the analysis that led to the NOI. The Corps urges rescission of the NOI. The Los Angeles District is available to meet and further discuss. Please contact the Corps' Los Angeles District Counsel Lawrence N. Minch at (213) 452-3946

or at Lawrence.N.Minch@usace.army.mil. I and my SPD staff attorney are also available to participate with the Los Angeles District in discussions via telephone. My telephone number is (415)503-6633; and my email is Annette.B.Kuz@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "Annette B. Kuz". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Annette B. Kuz
Assistant Chief Counsel/Division Counsel

